

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CONNIE WEISER)	
Claimant)	
)	
VS.)	
)	
USD 354)	
Respondent)	Docket No. 1,006,183
)	
AND)	
)	
KS ASSOC. OF SCHOOL BOARDS)	
Insurance Carrier)	

ORDER

Claimant requested review of the July 16, 2004 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 14, 2004.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant sustained two scheduled injuries as a result of her separate accidents on December 17, 2001 and May 1, 2002. He assigned a five percent impairment of function to the right lower extremity at the level of the knee as a result of her first accident, and a ten percent impairment of function to the left upper extremity at the

level of the shoulder as a result of the second accident. The ALJ also found claimant failed to sustain her burden of proof that she suffered any impairment in her thoracic spine as a result of either of her accidental injuries and therefore, her recovery was limited to two separate scheduled injuries. While the ALJ made provisional findings with respect to claimant's alleged permanent partial general disability (work disability),¹ including her task and wage loss, those factual findings need not be addressed in light of the Board's decision to affirm the Award of two scheduled injuries.

The claimant requests review of the nature and extent of her impairment. She contends that her second accidental injury left her with permanent impairments to both her left shoulder and back after her right knee gave way and caused her to fall. She maintains this subsequent injury and resulting impairment is the natural and probable result of her December 17, 2001 accident. Claimant further argues that she is entitled to work disability as she has been unable to return to her former position as a music teacher within her restrictions and that respondent has failed to accommodate her needs. Arguing further, claimant maintains her contract with the district, regardless of their alleged failure to accommodate, prohibits her from looking for employment elsewhere. Thus, she believes she is entitled to a 100 percent wage loss averaged with a 26.3 percent task loss, which combines for a 63.15 percent work disability.

Respondent argues that the Board should affirm the ALJ's Award of separate functional impairments for the December 17, 2001 right knee and the May 1, 2002 left shoulder injuries. Respondent asserts the evidence supports a finding of impairment to the right knee and left shoulder only, and that there is no competent evidence that claimant sustained any impairment to any other part of the body. And that even if claimant were entitled to a work disability as a result of her May 1, 2002 accidental injury, the school district has offered her accommodated employment at a comparable salary. Respondent alleges claimant's failure to report to work at any time after February 22, 2003, despite its willingness to accommodate her restrictions, constitutes a lack of good faith and that the comparable wage available to her as a music teacher within respondent's schools should be imputed, thereby precluding any recovery beyond the claimant's functional impairments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was injured in a fall on December 17, 2001. Claimant alleges she sustained not only a right knee injury, but injury to her neck and shoulder as well. However, the knee was the focus of all her treatment immediately after December 17, 2001 and for the following months. The right knee complaints did not resolve after conservative

¹ The ALJ reasoned: "[s]hould a reviewing body disagree with the Court's conclusions on the measure of the impairments resulting from [c]laimant's two accidents, and to avoid a remand, the Court will proceed to assess [c]laimat's entitlement to an Award of permanent partial general disability (known colloquially as a 'work disability award')." See ALJ Award (July 16, 2004) at 12.

treatment and the treating physician, Dr. Chris Miller, scheduled her for surgery. Before that could take place, claimant fell again after her knee gave out, on May 1, 2002, as she was getting out of her car. Claimant maintains she injured her left shoulder, neck and back of her head in this subsequent accident.

Although claimant had been receiving treatment for her injuries from her personal physician, Dr. Merle Fieser, she was subsequently seen by Dr. Paul Stein, who ultimately referred her to Dr. Prince Chan, an orthopaedic surgeon who specializes in the treatment of upper extremities.

Dr. Chan first saw claimant on October 4, 2002 and at that time he diagnosed her with impingement syndrome and bursitis. He recommended conservative treatment, including physical therapy and medications, and had claimant undergo a MRI which showed a possible tear in her left shoulder structure. When those efforts failed, he scheduled her for surgery. During the surgical procedure, Dr. Chan found that claimant's rotator cuff was intact, but that she was suffering from bursitis and in order to decrease the impingement, he performed a decompression.

Dr. Chan ultimately assigned a ten percent permanent impairment to the left shoulder and recommended claimant avoid lifting overhead anything more than ten pounds. Dr. Chan found no basis for assigning an impairment rating to claimant's neck or back.

Respondent referred claimant to Dr. Philip R. Mills, a physiatrist, for purposes of an evaluation relative to her other bodily complaints and the need for restrictions. Dr. Mills first examined claimant on October 21, 2002. Claimant completed a pain diagram which revealed pain in the knee only. There is no indication of neck or back complaints. She did, however, verbally express on-again, off-again pain in her right knee as well as nondescript pain in her back, neck and left shoulder.² During the examination, Dr. Mills observed no muscle spasms in either the cervical or thoracic areas. He found no objective evidence of injury to the neck or back as well as normal range of motion. With respect to the knee, he observed full extension, and an absence of crepitance, and no effusion or erythema. Although, he did find a "popping" which he found was consistent with a subpatellar plica, which is a fold in the synovial membrane that can become pinched when the knee bends.

Dr. Mills ultimately assigned a one percent to the knee and a zero percent to the thoracic spine. He deferred any impairment opinion relative to the shoulder to Dr. Chan. Dr. Mills testified that without more, claimant's subjective complaints of pain in her back did

² Mill's Depo. at 9.

not qualify her for a permanent impairment rating to the back under the 4th Edition of the *AMA Guides*.³

Claimant was evaluated by Dr. Mills again on March 20, 2003. Again, she completed a pain diagram and that diagram referenced pain in the right knee only. Claimant related no new complaints. Instead, she was concerned about her permanent work restrictions and how those related to her perception of her work duties. It appeared to Dr. Mills that claimant's view of her job duties was quite different from that expressed by respondent. For example, claimant requested Dr. Mills issue an order for respondent to provide an elevated chair or stool with a back and prohibit her from riding on school buses. Dr. Mills felt the use of an elevated chair was appropriate, but not a necessary work restriction. He further found no reason to restrict claimant from riding a school bus, nor did he believe she was unable to teach music as she had done before.

At her attorney's request, claimant was also evaluated by Dr. Frederick R. Smith, another physiatrist, on April 22, 2003. According to Dr. Smith, he examined claimant and observed "some restricted motion in the thoracic spine just below the bra line."⁴ At that time her main complaints were to her right knee, left shoulder and to her low back.⁵ He ultimately rated claimant at 11 percent permanent impairment to the left shoulder and 15 percent permanent impairment to the right knee. He also assigned a 5 percent impairment to the thoracic spine. However, when questioned about this aspect of his rating, he testified that there was no evidence that the thoracic area of the spine was involved in the accidents.⁶ Dr. Smith equivocated later in his deposition and testified that, based upon claimant's history, he believed the thoracic area was involved in the May 2002 fall.⁷ He also assigned permanent restrictions limiting any lifting over 20 pounds, or more than 15 pounds occasionally. Claimant was also advised to do no lifting over shoulder height and no prolonged above shoulder height reaching or use of her arm. She was told to limit stair climbing to occasional, once or twice per day, and to alternate between sitting and standing, with no standing more than 20 minutes per day. Finally, he restricted claimant from climbing, kneeling and squatting, and prohibited her from driving unless she has an automatic transmission-equipped vehicle, and suggested claimant "limit" use of her right lower extremity for repetitive activity like operating foot controls of an organ.⁸

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁴ Smith Depo. at 28-29.

⁵ *Id.* at 24.

⁶ *Id.* at 26-27.

⁷ *Id.* at 39.

⁸ *Id.* at 10.

In spite of her release, claimant never returned to work for respondent after February 22, 2003. She has made no effort whatsoever to obtain alternative employment other than to take on a part-time organist position at a local church. There are a plethora of letters between claimant and the superintendent for the school district. These detail what can only be described as claimant's demands regarding her working conditions and respondent's responses to those demands. Taken as a whole, the ALJ believed that respondent stood ready to accommodate any and all of the restrictions imposed by Dr. Mills. It was the restrictions claimant sought to add to those imposed by Dr. Mills, that posed difficulty for the district. Even in those instances when respondent would capitulate and the two parties would memorialize their intentions, claimant nevertheless failed to report to work. Still further, claimant was offered another contract for the 2003-04 school year *which she signed*. However, she never reported to work in spite of the terms of her contract.

The ALJ concluded claimant had sustained two separate functional impairments as a result of her work-related injuries. He awarded five percent permanent impairment to the right knee. In doing so, the ALJ discounted the opinions of Dr. Smith as he believed Dr. Smith failed to demonstrate a clear understanding of claimant's actual diagnosis, condition or treatment. The ALJ was more persuaded by the opinions of Dr. Mills as it related to the right knee. The ALJ awarded ten percent to the left shoulder based upon the opinions expressed by Dr. Chan, the treating physician, who he believed had a "greater familiarity with [c]laimant's care and the superior opportunity to assess [c]laimant's impairment over the course of treatment".⁹

The ALJ went on to note that there were three opinions bearing upon claimant's contention that she sustained a back injury in one or both of her falls. Neither Dr. Chan or Dr. Mills found any basis for awarding any permanency to claimant's neck or back. Only Dr. Smith assessed any functional impairment, five percent, to the back and even then, he testified at one point that he could not relate that impairment to claimant's accidental injuries. Indeed, claimant's own pain drawings, made on two separate occasions, do not reflect any complaints of pain in the thoracic spine.

The Board has considered the ALJ's finding with respect to claimant's functional impairments and affirms those findings. The Board, like the ALJ, is not persuaded that claimant sustained an injury to her back in either the December 17, 2001 fall or the subsequent May 1, 2002 fall. Similarly, the Board affirms the ALJ's finding that claimant is not entitled to an award premised upon a whole body impairment.¹⁰

⁹ ALJ Award (July 16, 2004) at 6.

¹⁰ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 16, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director